

## Delaware Court of Chancery Issues Guidelines For Preservation of Electronically Stored Information

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The Delaware Court of Chancery recently promulgated advisory guidelines to assist in the preservation of electronically stored information ("ESI"). The purpose of the guidelines is to remind all counsel appearing in any case before the Court of Chancery "of their common law duty to their clients and the Court with respect to the preservation of ESI in litigation." Specifically, that parties to litigation must take reasonable steps to preserve information "relevant to the litigation and that is within the party's possession, custody or control." Although the guidelines explain that the reasonableness of a party's preservation efforts will be determined on a case-by-case basis, the guidelines provide practitioners with the following advice:

**(1) Develop and Oversee a Preservation Process.** Counsel and their clients must develop, oversee, and document a preservation process. This includes collaboration with the appropriate client information technology personnel (if applicable) to identify and locate potentially relevant ESI to prevent its destruction. The court notes that as a "starting point," counsel and their client should consider the following as potential sources of relevant ESI: business laptop computers, home computers (desktops and laptops), external or portable storage devices such as USB flash drives (also known as "thumb drives"), and personal email accounts. In addition, "counsel should take reasonable steps to verify information they receive about how ESI is created, modified, stored, or destroyed."

**(2) Implement Litigation Hold Notice.** Counsel should develop written instructions for the preservation of ESI in the form of a litigation hold notice. The litigation hold notice should be distributed to the custodians of potentially relevant ESI when litigation is "reasonably anticipated." Counsel should instruct their clients that if litigation commences before a litigation hold notice has been disseminated, clients should "take reasonable steps to act in good faith and with a sense of urgency to avoid the loss, corruption or deletion of potentially relevant ESI."

**(3) Confer with Client and Opposing Counsel.** Early in litigation, counsel should confer with their clients not only regarding the importance of preservation of ESI, but also regarding the scope and timing of the discovery of ESI. In addition, counsel should discuss with opposing counsel the scope and timing of discovery of ESI and the possibility of limiting or forgoing the discovery of ESI. It is essential to raise the issue of preservation of ESI at an early stage of the case, and to resolve this issue by agreement or with a court order, so that such disputes are addressed and resolved before they become a spoliation issue.

Although the court will evaluate each preservation process individually, by implementing the court's guidelines, counsel and their client have a greater chance of preventing problems that the court considers "are often difficult to remedy after the fact" and that lead to the imposition of "serious consequences." Just as the Court of Chancery Rules Committee is continuing to monitor the broader topic of discovery of ESI, counsel and their clients should continue to monitor their preservation process to ensure maximum safeguards.

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